These are the tentative rulings for civil law and motion matters set for Tuesday, March 24, 2015, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, March 23, 2015. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances are governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0062081 GCFS, Inc. vs. Perez, Cindy C.

Plaintiff's Motion for Facts and Documents Deemed Admitted is granted. Plaintiff's Requests for Admissions (Set One) are deemed admitted by defendant. Plaintiff is awarded sanctions in the amount of $430 from defendant. Code Civ. Proc. § 2033.280(c).

2. M-CV-0062321 First National Bank of Omaha vs. Minor, Richard W.

Defendant's Motion to Set Aside Default and Grant Defendant Leave to Answer the Complaint is denied without prejudice.

Defendant's notice of motion was served with insufficient notice time. At the prior hearing, the court ordered that the papers be timely served. The court notes that defendant waited an additional 17 days before serving the papers. Plaintiff was served with notice of hearing only 12 court days prior to the hearing date. All moving papers must be filed and served at least 16 court days before the hearing, plus additional time based on the manner of service. Code Civ. Proc. §§ 585.5(c), 1005(b).

3. M-CV-0062911 Heldt, Donald R. vs. Alonzo, Julio et al

Appearance required on March 24, 2015, at 8:30 a.m. in Department 40.

4. M-CV-0063095 Slate Creek Roseville, LLC vs. Healy, Michael

Appearance required on March 24, 2015, at 8:30 a.m. in Department 40.

5. S-CV-0029141 Cooley, David, et al vs. Centex Homes

This tentative ruling is issued by the Honorable Charles D. Wachob:

On its own motion, the court vacates the Order re: Centex Homes' Request for Order Compelling Depositions and Further Discovery Responses From Travelers, entered February 27, 2015. This order was signed prematurely as the court was not aware that objections had been filed by Centex on February 20, 2015, and did not consider the objections.

The hearing regarding Centex's Objection to Recommendation of the Special Master is set for April 7, 2015, at 8:30 a.m. in Department 42.

6. S-CV-0032565 North Lakeshore, LLC vs. Turn-Key Construction Group, Inc.

Turn-Key's Motion for Order Determining Good Faith Settlement

Turn-Key Construction Group, Inc.'s (Turn-Key's) Motion for Order Determining Good Faith Settlement was initially set for hearing on March 10, 2015. The court issued a tentative ruling denying the motion. At the hearing on the motion, the court permitted Turn-Key to submit a supplemental declaration in support of the motion, and continued the matter to allow opposing parties to respond. Upon consideration of the supplemental declaration of Tom Blackburn, as well as the supplemental responses filed by opposing parties, the court issues the following tentative ruling:

Turn-Key's Motion for Order Determining Good Faith Settlement is denied.

Cross-defendants M.J Excavating and H&K have opposed Turn-Key's motion on numerous grounds, including that the settlement for $160,000 plus assignment of Turn-Key's claims is not within the "ballpark" of Turn-Key's share of liability for plaintiff's injuries. In determining whether the subject settlement was within the "good faith ballpark" under Code of Civil Procedure section 877.6, the court must consider several factors, including a rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, as well as the settling tortfeasor's potential liability for indemnity to joint tortfeasors. *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499; *Far West Fin'l Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 816.

Although Turn-Key has submitted a declaration regarding its estimation of the cost to repair the subject swimming pool, the evidence presents remains insufficient to establish a rough approximation of plaintiff's total recovery, or Turn-Key's own potential proportionate liability for all damage claims asserted.

The settlement at issue contains a non-cash element, TKC's assignment of any and all rights it might have against the other parties for claims arising from this action. As the court must determine the value of the consideration paid in settlement, the settling parties must establish the value of assigned rights. *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1497. Proper valuation of the assigned rights may take into consideration factors such as the

maximum amount of money the assigned rights represent, a discount based on the cost to prosecute those rights to judgment, the probability of prevailing on the assigned rights and the likelihood of collecting on the judgment. *Regan Roofing Co., Inc. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1714. In this case, Turn-Key's counsel states in his declaration that counsel for plaintiff and Turn-Key have valued the assignment at $40,000 with respect to M.J. Excavating. Turn-Key sets forth no evidence to support its statement regarding the value of the assignment, or to permit the court to evaluate the propriety of Turn-Key's valuation.

The court is unable to determine whether the settlement amount is within the reasonable range of Turn-Key's proportionate liability, and there is insufficient information to establish the settlement value. Accordingly, Turn-Key's motion is denied.

Legacy Plumbing Co.'s Motion for Determination of Good Faith Settlement

Legacy Plumbing Co.'s Motion for Determination of Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiffs' injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

Seneca Stucco, Inc.'s Motion for Determination of Good Faith Settlement

Seneca Stucco, Inc.'s Motion for Determination of Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiffs' injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

7. S-CV-0034421 McGovern, Chris, et al vs. Sugar Bowl Corporation

Rulings on Objections

Plaintiffs' objections to defendant's evidence are overruled.

Ruling on Motion for Summary Judgment

Defendant Sugar Bowl Corporation's Motion for Summary Judgment is granted.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). Defendants moving for summary judgment bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete defense thereto. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Id.*

Defendant argues that each of plaintiffs' claims in this action are barred under the doctrine of primary assumption of risk. Primary assumption of risk applies where plaintiff is injured due to a risk that is inherent in the activity in which plaintiff chose to participate, and defendant is relieved of any duty to plaintiff. *Luna v. Vela* (2008) 169 Cal.App.4th 102, 111-112. In this case, plaintiff Chris McGovern was engaged in the sport of skiing. Plaintiff is an advanced to expert level skier who often skied double-black diamond, expert only terrain. (Deft. SSUMF 1,3.) Plaintiff was injured when he fell while skiing down a double-black diamond run, slid 40-50 feet towards a rock outcropping or cliff, then fell off the cliff to the snow, approximately 30 feet below. (Deft. SSUMF 12.)

On the date in question, plaintiff primarily skied black diamond and double-black diamond trails at the ski resort. (SSUMF 4.) Plaintiff got on the Summit Chairlift, which is marked as accessing expert only, double-black diamond runs. (SSUMF 4, 9.) The sign also warned, "NO GROOMED RUNS NO EASY WAY DOWN." (SSUMF 9.) Plaintiff has no recollection of the incident. (SSUMF 13.) Plaintiff's son, Sean Leddy (Leddy), testified that the snow conditions were not good, and that it was more difficult to hold an edge than it had been lower on the mountain. (Leddy dep. at 59:25-60:7.) Leddy testified that he believed that as they skied down the Gold Rush trail and plaintiff approached a particular rock outcropping and cliff, he spotted the cliff, turned hard to avoid continuing straight over the edge, then fell and lost control, sliding approximately 40-50 feet towards the edge, then ultimately sliding off the cliff and falling approximately 30 feet onto the snow below. (*Id.* at 63:19-65:20, 77:8-19.) Leddy further testified that although the run was skiable, the conditions "were very bad" and "it didn't seem safe." (*Id.* at 73:15-18.)

Skiing is an inherently dangerous activity. A person who participates in skiing risks falling on steep slopes or uneven terrain, and faces many dangers, such as "surface or subsurface snow or ice conditions; bare spots; rocks, trees and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snowmaking or snow-grooming equipment." *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 266-267; *see also Danieley v. Goldmine Ski Assoc., Inc.* (1990) 218 Cal.App.3d 111, 123. A skier on an advanced run must expect to encounter hazards that are greater than and in addition to those hazards that are present in other areas of a ski resort. *O'Donoghue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188, 193.

Plaintiff intentionally chose to ski on an expert only, double-black diamond run. Plaintiff was an advanced to expert level skier who had skied hundreds of times before the incident, and had skied at Sugar Bowl at least five times prior to the date of the incident. The presence of numerous rock bands and outcroppings below the ridgeline of the mountains included in the Sugar Bowl ski resort area is visible from trails below, and from the chairlifts that service these areas. (Deft. SSUMF 5.) Sugar Bowl trail maps also show the presence of rock outcroppings and cliffs on double-black diamond trails. (Deft. SSUMF 6.) Plaintiff was aware of the presence of cliffs within other areas of the resort, and had reason to expect that rock outcroppings and steep cliffs were hazards that would be encountered on double-black diamond, expert only terrain. The presence of rock outcroppings and cliffs, and the danger of falling and sliding off such a cliff, is inherent in the activity in which plaintiff was voluntarily participating.

Accordingly, the doctrine of primary assumption of risk would apply in this case to bar defendant's liability.

Plaintiffs argue that summary judgment is inappropriate because defendant breached its duty not to increase the risks beyond those inherent in the activity. *Luna v. Vela, supra,* 169 Cal.App.4th at 111-112. While duty is a question of law, whether defendant increased the risk is generally a question of fact for the jury. *Id.* at 112-113. For example, in *Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, a question of fact existed as to whether the ski resort's placement of a particular warning sign where it was virtually invisible to skiers crossing over to the connector trail increased the risks inherent in the sport of skiing. The *Van Dyke* court distinguished this factual scenario from cases where skiing injuries were caused by a natural feature of the terrain. *Id.* at 1315. In *Van Dyke*, the court noted that the ski resort had "*by an affirmative act*, significantly increase[d] the risk of harm without enhancing the sport." *Id.* at 1317 (emph. added).

Other cases cited in support of this argument make clear that some affirmative action by the defendant must be shown. *See Luna v. Vela* (2008) 169 Cal.App.4th 102 (placement of volleyball tie lines across the sidewalk without using flags or otherwise making the support strings more visible); *Huff v. Wilkins* (2006) 138 Cal.App.4th 732 (permitting 14-year old son to drive ATV without training or supervision, in violation of Vehicle Code and contrary to manufacturer recommendations); *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577 (ski jump reshaped by ski resort employee using a snow cat); *Distefano v. Forester* (2001) 85 Cal.App.4th 1249 (defendant built unmarked series of hazardous jumps for a racing event).

The evidence presented by plaintiffs is not that defendant, by affirmative act, increased the risks inherent in skiing on double-black diamond, expert only terrain. Rather, plaintiffs note that defendant failed to clearly mark the rock outcropping and cliff with signs, even though elsewhere at the resort some cliffs are marked, failed to post signs informing guests that unmarked cliffs existed on trails that were accessible from the Summit Chair, and further did not advise guests that it did not post warning signs at all cliff areas. In essence, plaintiffs argue that defendants increased the risk of harm by failing to warn of the type of risk inherent in the activity undertaken in this case. However, no cases cited by plaintiffs stand for the proposition that the mere failure to warn of inherent risks caused by natural conditions of the terrain qualifies as an affirmative act which unnecessarily increases the risk of injury to individuals.

Based on the foregoing, defendant's Motion for Summary Judgment is granted.

8. S-CV-0034475 Action, Shannon Helene vs. Welsh, Amanda

Defendant's Motion for Leave to File Cross-Complaint is denied without prejudice. There is no proof of service in the court's file demonstrating proper and timely service of the motion, and ex parte order setting the motion on shortened time, on plaintiff.

9. S-CV-0034799 Miller, Chris, et al vs. NR Homes, Inc., et al

Plaintiffs' Motion to Compel Document Production From Non-Party Witness is denied. There is no proof of service showing that the non-party deponent to whom this motion is directed was personally served with the motion. Cal. R. Ct., rule 3.1346.

10. S-CV-0035203 Silva, Sandra vs. Springfield, David, et al

The Motion to be Relieved as Counsel by Allan R. Frumkin, Law Offices of Allan R. Frumkin, Inc., is granted, effective upon filing of the proof of service of the court's order on plaintiff Sandra Silva and all parties who have appeared in this action.

11. S-CV-0035333 Orpilla, Rudy P., et al vs. Ocwen Loan Servicing, LLC, et al

Defendants' request for judicial notice is granted.

Defendants' unopposed Demurrer to Complaint is sustained without leave to amend.

Plaintiffs' first cause of action for fraud and second cause of action for negligent misrepresentation fail to state valid claims. Plaintiffs allege that representatives of defendant Ocwen Loan Servicing, LLC (Ocwen) suggested that they go through the loan modification process and that loan modification was an available option for their loan. Such statements do not constitute actual promises that plaintiffs would receive a loan modification on specific terms. Plaintiffs also allege that Ocwen representatives falsely represented that plaintiffs' loan modification application was incomplete, that certain documents were not properly executed, or that faxes sent by plaintiffs were not received. Plaintiffs allege that defendant knew it did not intend to modify plaintiffs' loan because of limitations in its servicing agreement with defendant ARLP Trust. However, according to documents of which the court takes judicial notice, ARLP Trust was not assigned a beneficial interest in the deed of trust until October 2014, after the various dates of representations alleged in the complaint. (RJN, Exh. 7.)

Plaintiffs fail to allege detrimental reliance and resulting damages with sufficient particularity. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976. "[S]pecific pleading is necessary to 'establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom." *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092. Plaintiffs were not promised that they would receive a loan modification, and any default in the terms of the loan were caused by plaintiffs' failure to make obligatory payments. Ocwen did eventually acknowledge that plaintiffs' complete loan modification application was received, and subsequently denied the application. The allegations of constant phone calls with a revolving door of "authorized representatives" and repeated submission of identical documents describe an understandably frustrating and unfortunate process from plaintiffs' perspective, but fail to support a cause of action for fraud or negligent misrepresentation.

Plaintiffs' third cause of action for negligence fails to state a valid claim. A lender owes no duty of care to a borrower, unless "the lender actively participates in the financed enterprise

beyond the domain of the usual money lender. *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1096. A loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal. App. 4th 49, 67.

Plaintiffs' fourth cause of action for intentional infliction of emotional distress fails to state a valid claim. Plaintiffs fail to allege extreme and outrageous conduct by defendants, going beyond all possible bounds of decency. *Mintz v. Blue Cross of Cal.* (2009) 172 Cal.App.4th 1594, 1608.

Plaintiffs' fifth cause of action for wrongful foreclosure fails to state a valid claim. Plaintiffs allege that they were informed in October 2014 that their loan file would be referred "to active foreclosure". However, there is no indication that a notice of default has been filed, or that wrongful foreclosure proceedings have commenced. This cause of action is based on the prior causes of action, which are deficient. Plaintiffs do not allege that defendants lack the authority to commence foreclosure proceedings for any reason. Plaintiffs do not deny that they are in default under the terms of the subject loan.

Finally, plaintiffs' sixth cause of action for violation of Business and Professions Code section 17200 fails to state a valid claim. Plaintiffs fail to allege injury in fact, or the loss of money or property as a result of unfair, unlawful or fraudulent business practices by defendants. Plaintiffs admittedly defaulted under the terms of their loan, and do not contend that they were legally entitled to a loan modification. This cause of action is based entirely on the other claims asserted in the complaint, all of which fail to state valid causes of action.

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is somehow capable of amendment and, as the demurrer was unopposed, plaintiffs have failed to make any showing that the complaint can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

12. S-CV-0035373 Armer, John B., et al vs. Anderson, Lawrence

The Motion to Strike is continued to April 7, 2015, at 8:30 a.m. in Department 40.

13. S-CV-0035511 Stout, Vicki vs. RCO Services, LLC, et al

Plaintiff's Application for Right to Attach Order and Writ of Attachment is denied.

As a preliminary matter, defendant's opposition to the application is not untimely. Pursuant to Code of Civil Procedure section 484.060(a), any opposition to the application must be served at least 5 court days prior to the hearing, which was done in this case. Plaintiff's request to strike the declaration of Ryan Olson is denied.

Plaintiff fails to establish the probable validity of her claim in this action. Plaintiff establishes the existence of a promissory note by which defendants agreed to make installment payments to VS Property Inspection Service, Inc., and defendants' default on said agreement. However, the court must also consider the evidence submitted by defendants in support of their claims of intentional misrepresentation and concealment relating to the same promissory note. In light of the evidence submitted by defendants, plaintiff does not establish by a preponderance of the evidence that her claim in this action is probably valid. *See Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 80.

Defendant's request for attorneys' fees is denied. Code of Civil Procedure section 482.110 does not provide for attorneys' fees in the successful defense of the application. The denial is without prejudice to defendant's application for fees if and when he becomes the prevailing party in the action.

14. S-PR-0007567 Durham, Kyleigh and Thrash-Durham, Alexander - In Re

Appearance required. Plaintiffs are advised that their notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Plaintiffs' Motion for Order Compelling Attendance at Deposition is granted. Respondent Heather Thrash is ordered to appear for her deposition at the time and place chosen by plaintiffs. Plaintiffs are awarded reimbursement for court reporter fees in the amount of $100. Plaintiffs' request for further sanctions is denied as plaintiffs failed to set forth the statutory authority for the request in their notice of motion. Code Civ. Proc. § 2023.040; Local Rule 20.2.4(E).

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